

CA20N

Z1

-83 H021



Ontario

In Camera
①
Jan 30/84

ROYAL COMMISSION OF INQUIRY INTO CERTAIN
DEATHS AT THE HOSPITAL FOR SICK CHILDREN AND
RELATED MATTERS.

Hearing held
8th floor
180 Dundas Street West
Toronto, Ontario

The Honourable Mr. Justice S.G.M. Grange

Commissioner

P.S.A. Lamek, Q.C.

Counsel

E.A. Cronk

Associate Counsel

Thomas Millar

Administrator

Transcript of evidence
for

January 30, 1984


VOLUME 1

(in-camera)

OFFICIAL COURT REPORTERS

Angus, Stonehouse & Co. Ltd.,
14 Carlton Street, 7th Floor,
Toronto, Ontario M5B 1J2

595-1065



Digitized by the Internet Archive
in 2023 with funding from
University of Toronto

<https://archive.org/details/31761118485051>



"IN-CAMERA"

ROYAL COMMISSION OF INQUIRY INTO CERTAIN
DEATHS AT THE HOSPITAL FOR SICK CHILDREN
AND RELATED MATTERS.

Hearing held on the 8th Floor,
180 Dundas Street West, Toronto,
Ontario, on Monday, the 30th day
of January, 1984.

- - - - -

THE HONOURABLE MR. JUSTICE S.G.M. GRANGE - Commissioner
THOMAS MILLAR - Administrator
MURRAY R. ELLIOT - Registrar

- - - - -

APPEARANCES:

P.S.A. LAMEK, Q.C.)	Commission Counsel
E. CRONK)	
T.C. MARSHALL, Q.C.)	Counsel for the Attorney
D. HUNT)	General and Solicitor General
L. CECCHETTO)	of Ontario (Crown Attorneys
	and Coroner's Office)
I.J. ROLAND)	Counsel for The Hospital for
M. THOMSON)	Sick Children
R. BATTY)	
B. PERCIVAL, Q.C.)	Counsel for The Metropolitan
D. YOUNG)	Toronto Police
K. CHOWN	Counsel for numerous Doctors
	at The Hospital for Sick
	Children
B. SYMES	Counsel for the Registered
	Nurses' Association of Ontario
	and 35 Registered Nurses at
	The Hospital for Sick Children
H. SOLOMON	Counsel for The Ontario
	Registered Nursing Assistants
J. SOPINKA, Q.C.)	Counsel for Susan Nelles -
D. BROWN)	Nurse

(Cont'd)...



APPEARANCES: (Continued)

E. FORSTER	Counsel for Phyllis Trayner - Nurse
B. JACKMAN	Counsel for Mrs. M. Christie - R.N.A.
S. LABOW	Counsel for Mr. & Mrs. Gosselin, Mr. & Mrs. Gionas, Mr. & Mrs. Inwood, Mr. & Mrs. Turner, Mr. & Mrs. Lutes, and Mr. & Mrs. Murphy (parents of deceased children)
W.W. TOBIAS	Counsel for Mr. & Mrs. Hines (parents of deceased child Jordan Hines)
J. SHINEHOFT	Counsel for Lorie Pacsai and Kevin Garnet (parents of deceased child Kevin Pacsai)
M. ROSENBERG	Counsel for Sui Scott - Nurse

VOLUME 1



1

2

A/BM/ak

3

--- Upon commencing at 10:05 a.m.

4

5

THE COMMISSIONER: Now, Mr. Sopinka, you caused us to gather here, do you want to tell us why?

6

7

8

9

10

11

12

13

MR. SOPINKA: Well, I have three points to be raised; one with respect to the admissibility of certain evidence in the testimony of the witness Costello; the second point relates to the police report, production of the police report and the third point is with respect to having evidence that relates to Phase II adduced from the witnesses that are now appearing, that is, the nurses.

14

15

16

THE COMMISSIONER: I wonder if we could, do you have a particular desire as to the order you are requesting to discuss them?

17

18

19

20

21

22

23

MR. SOPINKA: It doesn't matter to me.

24

25

THE COMMISSIONER: I think the second and third we can dispose of quite readily.

Mr. Lamek was going to make an announcement at the beginning of the formal, the opening hearing but he may as well make it now, I think it is about the police report.

MR. LAMEK: And I may want to make



1
2 it again in a public session, Mr. Commissioner.

3 THE COMMISSIONER: All right.

4 MR. LAMEK: Just going back on the
5 brief history of the thing. At the meeting between
6 Messrs. Sopinka, I believe Strathy, Percival, myself
7 and you, sir, it was agreed with respect to the
8 police report that it could not be released containing
9 materials which went beyond the terms of reference
10 as you had defined them and, in particular, that
11 meant as containing information going to the ongoing
12 investigation of the police after May of 1982 except
13 as such information investigation relating to cause
14 of death. It was therefore agreed that I could be
15 trusted to adduce an expurgated version of the
16 police report eliminating the offending material.
17 That I have been able to do with the co-operation
18 of Mr. Percival, and I'm grateful to him for that,
19 and it has now been finalized and indeed bound.
20 The question that remains is to the scope of the
21 circulation of the expurgated version of the report.

22 At the meeting which I have described
23 it was originally contemplated that I believe it
24 would go to those who might be most directly
25 affected by it, that is to say, Mr. Sopinka and
Mr. Strathy with respect to their clients. In later



1
2 discussion with Mr. Percival it seems to me there
3 is probably no objection to its having wider
4 circulation.

5 What I propose to do today is
6 deliver copies of the report as expurgated to
7 Mr. Sopinka and to Mr. Strathy and ask them to let
8 me know by tomorrow morning whether they have any
9 objection to its receiving wider circulation to
10 all counsel and, if so, perhaps we could have
11 submissions on that before you tomorrow.

12 THE COMMISSIONER: Yes. Also, if
13 they have any objection to the deletion too.

14 MR. LAMEK: Yes but of course they
15 won't know what the particular deletions were. But
16 I have described the scope of them, they are matters
17 which go to the investigation after May of 1982 and
18 which do not otherwise bear on the terms of
19 reference.

20 THE COMMISSIONER: Yes. Well, you
21 don't have to answer that question now but you can
22 think about it and if you have any objection to that,
23 you can say so tomorrow.

24 MR. LAMEK: One thing I should
25 make clear, Mr. Commissioner, before I end.
Mr. Percival has made it clear to me and I don't



1
2 think there should be any doubt in anyone's mind
3 that he has asserted a claim of privilege in respect
4 of the entire contents of the police report, I make
5 no comment on that, to the extent that he is agreeing
6 with his client's consent to release to counsel,
7 any counsel, portions of the report. He insists he is
8 not to be taken as waiving any privilege he may
9 assert in respect of the balance. Is that fair?

10 MR. PERCIVAL: That is fair.

11 THE COMMISSIONER: But that doesn't
12 mean that it is acknowledged ---

13 MR. PERCIVAL: I understand that,
14 Mr. Commissioner.

15 MR. LAMEK: But merely the assertion
16 of it.

17 MR. SOPINKA: I think that that
18 is a positive first step. Mr. Lamek said two things
19 which aren't the same thing. I mean, the deletions
20 that I probably will be most concerned about are
21 the ones after May of '82. He said it has been
22 agreed that anything will be deleted that doesn't
23 bear on the cause of death and then he said anything
24 was deleted that didn't relate to the terms of
25 reference. Those are quite two different things.

THE COMMISSIONER: He is deleting



1
2 anything that bears on the investigation after the
3 release of your client unless what is there bears
4 upon the cause of death, in which case it is not to be
5 deleted.

6 MR. SOPINKA: Well, I think that
7 is too restrictive because there may be something
8 that relates to the terms of reference after May of
9 1982 as to the nature of the investigation that
10 ought to have been conducted in the first place
11 which would be relevant to Phase II. For instance,
12 let's suppose that there is an interview, just as
13 a pure example, there is an interview with a witness
14 who has never been interviewed until June of '82
15 and the witness says if you had just spoken to me
16 I could have given you this information and that
17 would have completely changed your view of the thing
18 and it is something that in your opinion they ought
19 to have done.

20 THE COMMISSIONER: Well surely it
21 will have something to do with the cause of death,
22 would it not?

23 MR. SOPINKA: Well, it may or may
24 not.

25 THE COMMISSIONER: Well, it would
have to have something to do with the cause of death



1
2 even if it is going to affect the final dissemination
3 of the cause of death then it should be produced
4 and that I take it it will be. So that obviously
5 if that circumstance that you gave - you might be
6 able to dream up another one but you are going to
7 have some trouble because anything that is vitally
8 important to the investigation will obviously have
9 something to do with the cause of death.

10 MR. SOPINKA: Well, so long as we
11 have that understanding.

12 THE COMMISSIONER: Well, I don't
13 think there is any question about that. I haven't
14 seen the deletions but...

15 MR. LAMEK: No. I think that not
16 to be a difficulty.

17 MR. SOPINKA: And I'm sure I can
18 discuss it with Mr. Lamek and draw him out on the
19 nature of the deletions so as to satisfy me because
20 I have difficulty.

21 THE COMMISSIONER: Well, we are
22 giving the whole report to you.

23 MR. SOPINKA: Well, I have
24 difficulties making submissions as to ---

25 THE COMMISSIONER: I know you do,
I know you do.



1

2

MR. SOPINKA: Without having seen it.

3

4

THE COMMISSIONER: But this is the way we tried to resolve the problem.

5

6

MR. SOPINKA: Well, I think that is a reasonable way of proceeding.

7

8

9

10

11

12

THE COMMISSIONER: Now, the next thing, I did say something about Phase II in Phase I. We are getting very close to Phase II now, I don't want to have this witness - if this witness had something to do with Phase II I don't want to have to bring her back if she has just one or two questions going on. Do you have any concern about that?

13

14

15

16

17

18

19

20

21

22

MR. SOPINKA: No. My point is this that I can understand that there shouldn't be if possible a duplication by Commission Counsel. As far as I am concerned, if the Commission Counsel wishes to lead the evidence that might otherwise be lead in Phase II, that's fine, but I reserve the right to have the witness called back for cross-examination. I'm not prepared for Phase II. I always thought that Phase II, first of all, I would have the police report some time in advance and, secondly ---

23

24

25

THE COMMISSIONER: You have it today, so, you have it some time in advance, yes.



1
2
3 MR. SOPINKA: My view of it was,
4 and I remember arguing this before you and I don't
5 think you disagreed that Phase II was an examination
6 into what the police did and ordinarily I would have
7 thought that I would have had a chance to ask the
8 police how they proceeded before those against whom
9 the investigation was directly testifying. So,
10 I may be in some difficulty because I don't know
11 what the police evidence is and that's why I ask
12 for the unrestricted right to ---

13 THE COMMISSIONER: Well, I don't
14 think there is any real problem, I wouldn't have
15 thought, so far as your client and Mr. Strathy's
16 client is concerned. I don't think there is a real
17 problem. It is not intended that they will be
18 questioned particularly on Phase II, is it, in this
19 Phase. They can give evidence when they are invited
20 to at the end of Phase II, just as they have been
21 invited to do at the end of Phase I. But the other
22 members of the Trayner team, certainly the nurses
23 who weren't on the Trayner team, I don't want to
24 have to bring them back, that's all, unless we have
25 to.

26 I really think that the main things are,
27 are they not, the meeting of March 23rd on which ---



1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

MS. CRONK: And later that week.

THE COMMISSIONER: And later that week, that really is essentially all we are going to ask.

MS. CRONK: That's right.

MR. PERCIVAL: I gather that what Mr. Sopinka is really concerned about is something that was disclosed at a later time by Mary Costello for the first time to the police and copies of which have been given to counsel.

THE COMMISSIONER: Yes. Well, we will deal with that in a minute.

MR. PERCIVAL: But I agree with you, Mr. Commissioner, you know, why have them come back again on a second time because we are right into it.

THE COMMISSIONER: Yes, I think so. Yes, Mr. Hunt.

MR. HUNT: In one sense we are right into it, Mr. Commissioner, insofar as the police dealing with this witness and the other witnesses are concerned and that properly is Phase II but there is another aspect that I wonder if you are intending to go so far as opening this up and that is in terms of the dealings the witnesses may have



1
2 had with Crown Attorneys in the course of preparation
3 for hearing their evidence at the preliminary hearing.
4 It may be that even though Commission Counsel seemed
5 to limit their examination to matters they feel for
6 the police others would want to expand it into
7 areas where the Crown is involved and that may
8 change the character of the examination that we
9 are dealing with now if it is going that far.

10 THE COMMISSIONER: I certainly
11 hadn't thought that we were going into that. Has
12 anybody got any contrary thought?

13 MR. PERCIVAL: I wasn't certainly
14 intending to get into that aspect.

15 MR. SOPINKA: No, but it raises
16 the question. Supposing I have some questions that
17 I would otherwise have with Ms. Costello with her
18 dealings with the Crown Attorneys. I am obviously
19 not going to put them now and if it comes germane
20 then I don't want it to be taken that somehow there
21 is an onus on me to have them back.

22 THE COMMISSIONER: No, but you will
23 have to - if for instance no one else wants to
24 have Nurse Costello back except you, you will have
25 to justify bringing her back and the way you will
justify it is, say, it just occurred to me today it



1
2 would be a good idea to ask her about this, you
3 will scream about the injustice and how your client
4 was being muzzled.

5 MR. SOPINKA: Well, how intractable
6 will you be, I mean, I haven't seen any results
7 so far.

8 THE COMMISSIONER: Well, it will
9 depend. I don't think I will go all the way to
10 the Divisional Court.

11 No, the one thing though I do want
12 to avoid though is having to call people back for
13 really just one or two simple little questions and
14 in all probability I'm sure we will be able to
15 agree what the answer is and save the witness coming
16 back. However, I know we are going to have problems
17 of that nature and I would expect you to address it
18 yourself just before the deadline for the papers comes
19 out you will have some statement that would be
20 good. But then Mr. Percival will stand up five minutes
21 later and we will have the next edition.

22 MR. SOPINKA: Well, I mean, I just
23 want to put the most difficult scenario, on June
24 30th I say I want Ms. Costello back and you have
25 made plans to go to the cottage, I mean, I don't
expect any difficulty.



1

2

3

MS. CRONK: We will invite you to
the cottage.

4

THE COMMISSIONER: All right.

5

6

MR. SOPINKA: Isn't that great
when you are in-camera.

7

8

9

10

11

12

MR. HUNT: Could I take it from
that then that we are not going to have questioning
of these witnesses on dealings that they had with
the Crown Attorneys in this prior preliminary hearing
because if that is an open area obviously we would
want to have people involved here to give us some
instructions.

13

14

15

THE COMMISSIONER: Have you given
any thought to Phase II to know whether you have
any such ---

16

17

MS. CRONK: It certainly wasn't
given any thought to get into that area at this
stage.

18

19

THE COMMISSIONER: Well, there you
are. So, I don't think it is going to be. Yes?

20

21

22

23

24

25

MS. SYMES: So that I understand,
we will be permitted to cross-examine our own
witness with respect to any statements that she made
to the police before Susan Nelles' arrest and
thereafter, up to and including May of '82?



1
2
3 THE COMMISSIONER: Well, I think
4 you will be able to cross-examine her about any
5 statements she made at the same time, I don't know
6 why. If she had made a statement yesterday that is
7 entirely contrary to what she said today, you can
8 cross-examine her, these are the ordinary rules of
9 cross-examination, there are no problems. We are
10 just not dealing with things after the release,
11 developments after the release but if something she
12 said has some bearing on the cause of death, as long
13 as she said yesterday, certainly, you can cross-
14 examine her about that, no problem. You understand
15 what I'm saying?

16 MS. SYMES: Well, clearly what is
17 Phase II aspects, that is the police investigations
18 starting on Sunday, March 22nd and it is opening
19 this period, that is, those nursing witnesses that
20 are called starting with this witness, they can be
21 questioned then with respect to what they said to
22 the police.

23 THE COMMISSIONER: Certainly.

24 MS. SYMES: And not specifically
25 related to the cause of death but with respect to
the police investigation as well.

THE COMMISSIONER: Well, are you



1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

concerned about the police investigation?

MS. SYMES: Some of my clients are, yes, most definitely.

THE COMMISSIONER: Well, that's something - but I don't want to get into that unless it is absolutely essential. What sort of questions do you have in mind that you might be asking some of your clients about the police investigation in this phase?

MS. SYMES: Well, Mr. Commissioner, if your ruling is that they will not be recalled, that is the only time ---

THE COMMISSIONER: Well, I can't make a ruling that they will not be called. What I am saying is, I hope not to have to recall them and if you in Phase II want to have one of the witnesses back, of course, if you still have standing in Phase II, which I presume you will have, or we are not too sure about funding, but if you still have standing at that time and want to call a witness for some reason of course you can call them. If you have to recall a witness, you have to get my permission and I may not give it if it seems to me that it is not necessary. If the thing goes to Mr. Sopinka, I don't think that either of you will



1
2 want to call somebody unless it is absolutely vital,
3 in which case you will concede, but if it is, if it
4 is something that either you forgot to ask or
5 something like that.

6 MR. SOPINKA: Well, that raises a
7 good point because I think Ms. Symes' point is well
8 taken. For instance, I'm sure I will want to know
9 what information she gave the police ---

10 THE COMMISSIONER: What did she say
11 to the police?

12 MR. SOPINKA: Yes.

13 THE COMMISSIONER: Well, we know
14 that.

15 MS. SYMES: No you don't I don't
16 think.

17 THE COMMISSIONER: Well, I thought
18 that it was in the report.

19 MS. SYMES: No.

20 THE COMMISSIONER: No?

21 MS. SYMES: There is a very
22 important meeting that occurred on Monday, March
23 23rd, as to the commencement of the police investiga-
24 tion.

25 THE COMMISSIONER: And that is
going to be gone into?



1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

MS. CRONK: That's right.

THE COMMISSIONER: This is what I don't want to happen. I don't want to have to come back and therefore if there is something that you feel has to be asked, even though it is in Phase II and not in Phase I, go ahead and ask it, but think about it, think about it.

MS. SYMES: Well, Ms. Costello would prefer to give evidence, she's not objecting to that, just so I understand those kinds of questions will be asked, she is most delighted to give her evidence.

THE COMMISSIONER: Well, that will make her happy. Now, has anybody else got any comments on Phase II and Phase I before we go to Mr. Sopinka's evidence?

MR. TOBIAS: I only have a question, Mr. Commissioner. Is it your intention to break after the conclusion of evidence in Phase I for some period of time so that counsel can prepare argument and hear argument in Phase I?

THE COMMISSIONER: That's right.

MR. TOBIAS: Before commencing with the taking of evidence of Phase II?

THE COMMISSIONER: That's my



1
2
3 intention. That really is so that some counsel
4 can be excused from - I don't want anything of
5 the cause of death coming up in Phase II and if
6 it does come up in Phase II, I will have some -
7 unless it is somebody who wants to tell us he saw
8 the smoking gun or something of that nature, but I
9 want to get all of this Phase I stuff over with
10 so that the argument can intelligently be given
11 and we won't have any of it in Phase II.

12 Phase II concentrates on the police
13 investigation and prosecution.

14 MR. PERCIVAL: Mr. Commissioner,
15 perhaps, I have already asked Commission Counsel
16 on this, could it be of some assistance to other
17 counsel if we knew what the likely order of
18 witnesses that we are taking about in the next
19 few weeks and dealing primarily with the nurses?

20 THE COMMISSIONER: I think we
21 have had that. We are having all of the other
22 nurses on the Trayner team, starting with
23 Ms. Brownless, Ms. Christie.

24 MR. PERCIVAL: We know Costello
25 is on now and who is the next one?

THE COMMISSIONER: Radojewski. Am
I right?



1 MS. CRONK: No, Bertha Bell.

2 MR. LAMEK: Bell and then Radojewski
3 and Johnstone and there may be a couple of additional
4 witnesses after those, Mr. Commissioner, I'm not
5 absolutely sure yet, but my friends and everyone
6 else will know as soon as I do and then, as you say,
7 we will go, starting with Brownless and working
8 through to Mrs. Trayner.

9 Could I say one other thing about
10 scheduling, please. I think you have now been
11 persuaded we should not sit the week of March 12th
12 which I believe to be the school break. It would
13 be I hope that we may be very close to the end of
14 the Commission evidence by the time we rise for
15 that week off. I have no idea yet, or very little,
16 whether other counsel propose to call evidence
17 following the end of the evidence which I propose
18 to tender. I would be grateful if I could know as
19 soon as possible what the plans of other counsel
20 are or the intentions of other Counsel. If by the
21 March break I could be told and there will be very
22 little more evidence to come from me after that it
23 would be helpful in scheduling things because then
24 I propose that having heard all of the evidence,
25 our own and that adduced by anyone else, I think I
would suggest to you that we take a couple of weeks
off and then come back for argument, if it does go
to scheduling and the start up of Phase II.

BN.jc
B1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

If I can ask to be told not later than the time we adjourn for the March break what the intentions of other counsel are to the calling of evidence, I would be grateful.

MR. SOPINKA: Mr. Commissioner, I seem to be in charge of this in-camera hearing but everybody seems to welcome it as an opportunity to unburden themselves. I hope you will tell the press it was a very fruitful meeting and not just for my objections.

THE COMMISSIONER: I think we will give Mr. Sopinka full credit.

MR. LAMEK: Absolutely.

THE COMMISSIONER: However, we haven't really got around to the point yet, have we?

MR. TOBIAS: Before we do that, Mr. Commissioner, I don't want to muddy the waters again, because you may not need to hear from us at all depending on what Mr. Sopinka says concerning his objections to the wider circulation of the expurgated version of the police statement.

It would certainly be helpful, and I think I speak for most counsel, if indeed having heard all of the evidence in Phase 1 we argued the point, and that was it, that was the end of it.



B.2

1

2

3

4

5

6

7

8

9

10

There is the problem of what happens if something inadvertently comes up in Phase 2 which goes to cause of death, which is another matter. But to ensure that everyone is satisfied that they have heard all of the evidence relating to cause of death and have had a full opportunity to cross-examine on it, it would be most helpful if the police report would be given that wider distribution. If it isn't, then I see that as a possible problem in terms of making argument at the completion of Phase 1.

(2)

11

12

13

14

15

16

17

18

19

20

21

22

THE COMMISSIONER: I think the police report argument, if there is to be any argument, should be done with everybody around because that is of some considerable importance as to whether it is or is not, and we will know by tomorrow at 10 o'clock, Mr. Sopinka or Mr. Brown, or Mr. Strathy or Ms. Forster, or somebody will tell us whether they have any objection to two things; the wide distribution and to the exclusion that has been conducted by Mr. Lamek and Mr. Percival. That is the first point, the admissibility of evidence, does anybody else want to say anything?

23

24

25

MR. SHINEHOFT: Yes. I have just one hypothetical question. What happens if all the



B.3

1

2

3

4

5

evidence as far as cause of death goes in on Phase 1,
and certain counsel are excluded and then in Phase 2
although it be unlikely, there is additional evidence
that is tendered as far as the cause of death?

6

THE COMMISSIONER: We have a problem.

7

MR. SHINEHOFT: What does that do as
far as the people who are not there?

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

THE COMMISSIONER: I have got a
problem, I tell you, I have got one. I shall blame
Mr. Lamek for having arranged this as Phase 1 and
Phase 2, I will find a scapegoat somehow. We will
have to solve that problem, and probably under
those circumstances I would have to send notices out
to all the people affected and say that this evidence
has been given, here it is, the witness is available
for cross-examination, come on back and amend your
argument accordingly. That is what I will probably
have to do but I can also reach the conclusion that
it is not that important, it doesn't matter, it is
not going to make any particular difference and I
won't do it. It is something I will have to deal
with at the time. What I am trying to do now is
ensure that it doesn't happen, okay?

23

24

25

Now, what about the evidence you
want to have excluded?



B.4

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

MR. SOPINKA: Well, at the risk of this being characterized as more yelling and screaming I have a serious objection to some evidence that is proposed to be tendered.

The substance of the evidence appears in a note made by the police on Tuesday, June 17th, and I am sure you are aware of it. In my submission --

THE COMMISSIONER: I have Thursday, June 17th, is that it, is that the one?

MR. SOPINKA: Thursday, yes.

THE COMMISSIONER: Is it the one that starts "7:20 - 7:28"?

MR. LAMEK: 7:20 a.m.

MR. SOPINKA: The substance of the statement that I submit is highly prejudicial and has virtually no probative value --

THE COMMISSIONER: Which one is it?

MR. SOPINKA: It is on page 2:

"I felt that Liz-that there is a murder in Liz' house and I couldn't look at Phyllis Trayner or Susan Nelles."

And then:

"Liz said of the two of them it had



B.5

1

2

"to be Susan Nelles because she was
more intelligent."

3

4

5

6

7

8

9

10

Now, based on the information I have,
I mean that is a pure speculation based on the fact
that earlier Miss Costello had attended a meeting
with the police, and the police were talking about
homicide. I mean, she has nothing to back it up, so
it is pure speculation, and I would submit would be
of no value, no probative value whatever but it will
be of great prejudicial effect if it is purported --

11

12

THE COMMISSIONER: Who was it that
said this?

13

14

MR. PERCIVAL: This is Mary Costello
talking to John Murray.

15

16

17

18

19

20

21

MS. CRONK: Just to help my friend;
there is two parts to it, the first as Mr. Sopinka
points out is the statement directly attributed to
Mary Costello. The second appears to be a statement
Miss Costello made attributing it to Elizabeth
Radojewski. The comment as to relative intelligence
of the two women is one apparently made by
Elizabeth Radojewski.

22

23

24

25

THE COMMISSIONER: I think - I don't
think there is going to be much question when we come
to dealing with statements of nurses, we should not



B.6

1

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

have hearsay unless the hearsay evidence can otherwise be admissible. Obviously what Radojewski may have said to Costello I don't think should be put in. I know we have been allowing it, and we are getting - it is most important it does not appear that we are getting into a witchhunt of any kind. I think the usual protection of the criminal law should be extended to all of the members of the Trayner team, and if anything was said by anybody about them we have to have the person who said it there for that purpose. I don't think there should be any questions put as to what did Mrs. Radojewski say, except from her. The first one though was apparently something Miss Costello said. Do you intend to adduce that, Ms. Cronk?

MS. CRONK: Only the part that deals with what Ms. Costello said as opposed to what she has attributed to Liz Radojewski.

THE COMMISSIONER: What is that part precisely she said?

MR. SOPINKA: "I felt there was a murder in Liz' house."

Now you have to bear in mind that this statement was not made to any police officer until June 17th, 1982, and she is talking about how she felt at the meeting of March 23rd, 1981. I



B.7

1

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

submit if you are applying the criminal standard that evidence as to how she felt based on nothing would not be admissible, even if it was admissible on some tenuous basis, it should be excluded on the basis it is so highly prejudicial.

THE COMMISSIONER: Is there some basis, and don't answer me and tell me what the basis is, but is there some basis for her feeling, or not?

MS. CRONK: In my submission there is, Mr. Commissioner.

THE COMMISSIONER: There is?

MS. SYMES: I would like to make a submission after Mr. Sopinka has finished.

THE COMMISSIONER: Yes, okay. I think we had better hear the rest of it.

MR. SOPINKA: Ms. Symes has spoken to Miss Costello more than we have. Based on what I have spoken to her about I submit you would be satisfied that there is nothing to back it up other than the fact that Susan Nelles was there, and Trayner was the leader of the team, and the fact that Susan Nelles happened to administer the proper dosage to Baby Pacsai. Perhaps I should finish my submissions.

THE COMMISSIONER: Yes.



B.8

1

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

MR. SOPINKA: Apart from that ground, that if you are applying a somewhat stricter test, and I submit you should at this stage, apart from that in my submission it should be excluded on the basis that it is not strictly speaking relevant to any subject matter in the Terms of Reference.

THE COMMISSIONER: Well it could be, it could be, that is something we may have to go into.

MR. SOPINKA: I understand the Divisional Court Judgment is coming down today, I was told that you were aware of that.

THE COMMISSIONER: Well, when I say I was aware of it, all I am aware of is that one of the judges was surprised that it didn't come down on Friday, that sort of gives me an indication.

MR. SOPINKA: I happened to be walking up the street and I ran into a person of undeniable reliability, it wasn't hearsay or anything of that nature, if you get my drift. He suspected having heard that I was blocking evidence here that this matter would be of some interest to me and I understand it is coming down today but I may be proven wrong yet, and I will no longer rely on that source of information.

THE COMMISSIONER: It may be the same



DM.rc
B.9

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

source I got it from, I don't know. In any event the rumour was that it was expected to be down on Friday and it didn't come down but it may come out today, that is the rumour. Often it has been my experience these judgments particularly when it is a two or three person judgment are sometimes not as easy to get out as you think.

MS. CRONK: Sir, may I just interject, I just want to be clear as to what Mr. Sopinka is objecting to, which portions of the statement.

THE COMMISSIONER: He is objecting to --

MS. CRONK: I'm sorry, if I could --

THE COMMISSIONER: Yes.

MS. CRONK: There are three parts to the statement which in my view are at least in issue. I am not suggesting for the moment that any are relevant or irrelevant. The first it seems to me, and I don't know if Mr. Sopinka has any objections, the first introduction to the statement where the police officers indicate that they explained the investigation and then in Staff. Sgt. Gordon's notes there appears to be an indication that Miss Costello acknowledged that someone was



B.10

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

deliberately killing babies. In Sgt. Murray's notes, I am not at all sure that is the same language, it appears to simply say: "Knowledge someone killing babies". It seems to me that is the first statement that is potentially in issue.

The second one Mr. Sopinka has drawn your attention to, and that is the comment expressly attributed to Miss Costello concerning what she perceived to be the situation on March 23rd in Liz Radojewski's house, and her comment that she had difficulty looking at Phyllis Trayner and Susan Nelles, that is the second.

The third it seems to me is a comment attributed by Miss Costello to Elizabeth Radojewski, the comment where Liz Radojewski is passing on the intelligence of these nurses. There is three, and I would just like to be clear before I am invited to respond.

THE COMMISSIONER: The Liz Radojewski one I don't think there is that problem with it, it just won't come from Costello, it would have to come from Radojewski.

MR. SOPINKA: We will face the same problem with Radojewski.

THE COMMISSIONER: We may well face it, if it comes at all it has to come from Radojewski.



1

B.11 2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

MS. CRONK: I raised it, sir, because it is my understanding you will be hearing submissions from other counsel on that.

THE COMMISSIONER: All right.

MR. SOPINKA: I don't object, I don't think I can object to the first statement because that does not identify, does not use the term "murder", says "deliberately killing". If it is based on something it might have some relevance to the cause of death. But I submit with respect to the evidence, first of all the terms "murder" is used which obviously draws a legal conclusion. Then the statement by Radojewski that one of them is smarter, I mean that is absolute garbage to allow that kind of evidence in, no matter who gives it.

Now, I submit that apart from the fact that it doesn't meet the criminal standard, or anywhere near it, it is not relevant, and of course here we have to get into some speculation as to what the Divisional Court is going to do. Whatever they do I submit that you clearly reserve the right to exclude certain evidence, where in your opinion its probative value is so slight that its prejudicial effect was such that you wouldn't include it if you were trying a case, even trying --



1

B12 2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

THE COMMISSIONER: I have very little trouble, because what we would do under those circumstances, you would exclude the jury and I would probably hear it. What is it you are claiming is the basis for this statement, and if there was no basis for it at all I would simply say you can't.

MR. SOPINKA: Absolutely. I would be quite content for you to hear this lady in chambers.

THE COMMISSIONER: I don't want to do too much of this. I thought we could sort of find out now -- is this the only thing that you are objecting to?

MR. SOPINKA: That is correct.

THE COMMISSIONER: What is the basis, or do you want to tell me, Ms. Symes, what was the basis upon which you said she made the statement?

MS. SYMES: Well, first of all, Mr. Commissioner, this clearly was made after your inquiry, the scope of your inquiry.

THE COMMISSIONER: I'm sorry it was made, this is a statement, wasn't this a statement made on the 23rd of March?

MS. SYMES: No, sir. It is made June 17, 1982.



1

B13

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

THE COMMISSIONER: Oh yes, this statement was, but she is referring to something she said back --

MS. CRONK: That she felt.

THE COMMISSIONER: Oh yes, that she felt.

MS. SYMES: Mr. Commissioner, with respect there is two parts to your investigation because the cause of death, the second part of the investigation is irrelevant and --

THE COMMISSIONER: It has nothing to do with the police investigation, I agree with that.

MS. SYMES: And now with respect to cause of death I think it has no relevance with respect to cause of death and is highly prejudicial for the following reason. The conversation relates to Miss Costello's feelings at the meeting at Liz Radojewski's on March 23rd.

THE COMMISSIONER: Before you go any farther, it is not just the statement. What is concerning me is is there something behind it, is there some reason why she felt that, is it an acceptable reason, and if it is I think we should heard it, if it isn't I don't think we should but,



1

B142

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

subject to what Ms. Cronk has to say. I was asking at the time, my question was, what caused her to feel that way.

MS. SYMES: I was just going to say on March 23rd in the afternoon, just hours before this meeting at Radojewski's, she met with Warr, the police officer, who introduced himself as from Homicide and informed her that he was looking at four babies' deaths, Cook, Miller, Pacsai and Estrella. He told them that a pattern was becoming obvious. He asked her which nurses were on duty for all four deaths. He told her that all four babies had high digoxin levels, and he said that someone thinks these babies were murdered with digoxin. He told them that the two Head Nurses were not to tell anyone about this meeting, but were to continue the pretense of a Coroner's Inquest on Pacsai.

It was with this knowledge and only this knowledge that she attended the meeting on March 23rd. In other words she had nothing other than what this police officer had told her several hours before this meeting. In other words, she, sir, had no first-hand knowledge whatsoever because she was in Vancouver the prior week returning late on



1

B15 2 Sunday afternoon.

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

So, Mr. Commissioner, my statement is that with respect to the issue of cause of death, the feelings that she had relate solely to what the police officer told her with respect to that. So that would have limited any probative value with respect to the cause of death, and I agree they were highly prejudicial to Trayner and Nelles.

MS. CRONK: May I speak to that issue, sir?

THE COMMISSIONER: Yes, you may.

I wonder if there is anyone else who wants to keep it out, we may as well have it in order.

MS. CRONK: I agree.

THE COMMISSIONER: Is there anyone else who wants to speak to keep it out?

MR. ROLAND: Mr. Commissioner, based on the facts, I don't know those facts that Ms. Symes has put before you --

THE COMMISSIONER: Why not wait until we hear, Ms. Cronk may have other facts, so if you are still making up your mind we will hear from you at the end. Is there anybody else who wants to keep it out?



B16

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

MS. FORSTER: I certainly do, sir,
for the reasons already stated by Ms. Symes and Mr.
Sopinka.

THE COMMISSIONER: Anyone else?

All right now, Ms. Cronk, let us
hear from you and if you are prepared to tell us
what the reasons are.

MS. CRONK: Sir, may I start with
the issue of the basis as I understand it on which
Miss Costello formed this belief.

In part I agree with the facts
suggested to you by Ms. Symes, but in several
respects they do not reflect my understanding. First,
as a result of my meetings with Miss Costello it was
not my understanding, although the question by my
recollection was specifically put to her, that Sgt.
Warr at any time during that meeting indicating it
was thought that someone was deliberately killing
these babies. I thought Ms. Symes had attributed
that statement to him directly, perhaps I misunder-
stood my discussions with Miss Costello.

THE COMMISSIONER: To Sgt. Warr?

MS. CRONK: Yes, to Sgt. Warr, that
had not been my understanding. It is absolutely
correct Miss Costello was absent from the Hospital



1
2 on vacation for the period March 14 until March,
3 the morning of March 23rd when she returned to duty.
4 The evidence has in part already established, and
5 will establish, however, that she was there variously
6 not on vacation for the entire other period with
7 which we are concerned. She was most certainly
8 there during the period of time when Janice -- I don't
9 mean physically personally on duty at the time of
10 death, but either the next morning or the day before,
11 when Janice Estrella died, for example, and many
12 of the deaths that occurred on Ward 4B.

13 It is my understanding, and there
14 are two parts of course to this comment; the first
15 is the statement that she felt there was a murderer
16 in the house. I had not had the understanding that
17 that might have been prompted by direct statement
18 by Sgt. Warr as suggested by Ms. Symes. I acknow-
19 ledge the fact that she had a meeting with Sgt.
20 Warr that day and he identified himself as an
21 officer from Homicide. She may tell us it influenced
22 her thinking in that regard, I don't dispute that.

23 The second part of her comment
24 however was that she couldn't look at either Phyllis
25 Trayner or Susan Nelles. After the arrest of Susan
Nelles she went to Elizabeth Radojewski and



1
2 apologized for her behaviour concerning those two
3 women. Now, that matter was not dealt with by
4 Ms. Symes, and quite frankly that is the part of
5 the comment which we as Commission Counsel are
6 most interested. It seems to me, sir --

7 THE COMMISSIONER: You interviewed
8 her, why could she not do it?

9 MS. CRONK: All right. Miss
10 Costello, it is my understanding that Miss Costello
11 will say when she began to think that there had
12 been foul play or deliberate malfeasance with
13 respect to these children that she reached the con-
14 clusion that it could only be a Registered Nurse who had
15 been involved. She was aware by that time and had been
16 for several months that most of these deaths were
17 associated with the same nursing team, that is
18 Phyllis Trayner's, and she had some -- she looked
19 to Phyllis Trayner and Susan Nelles in distinction
20 and therefore to the other members of that team.
21 Obviously I am interested specifically in why it
22 was not probed at length with her, perhaps for
23 obvious reasons at our pre-evidence meeting. She
24 did however say that she felt it had to be a
25 Registered Nurse and not a Registered Nursing
Assistant by virtue at least of the fact the



1
2 Registered Nursing Assistants were not authorized
3 to administer medications.

4 When it was pointed out to her that
5 there was at least one other Registered Nurse who
6 was a member of that team, namely Sui Scott, Miss
7 Costello may be able to offer an explanation on the
8 witness stand as to why she was not taken into
9 consideration.

10 There is no doubt, sir, that the
11 basis at least for part of her statement was that
12 she felt if indeed there had been foul play and
13 she refers to the thought that there was at this
14 stage of the game, it necessarily had to include
15 Registered Nurses and specifically she had diffi-
16 culty with those two individuals.

17 I suggest to you, sir, that the
18 basis for that conclusion with this woman, given
19 her experience and position, was formulated not
20 solely on the basis of any meeting that she had
21 with Sgt. Warr on March 23rd; or at least we
22 should find out, and that evidence should be put
23 before you, but rather on her experience and
24 exposure to that team on these wards and those
25 deaths.

In my submission, perhaps I should



1
2 have made this very clear, it was never our
3 intention, sir, to put these statements to Miss
4 Costello directly and seek to have them admitted
5 as an exhibit. Rather it was our intention to
6 canvass with her, to use them only if necessary,
7 sir, as a prior and consistent statement if indeed
8 it should happen that Miss Costello gives evidence
9 contradictory to what is recorded in these notebooks.

10 THE COMMISSIONER: The point is not
11 a question-if that is something that is contra-
12 dictory, but whether it is evidence that should be
13 led at all.

14 MS. CRONK: I understand that, sir.
15 The difficulty, sir, as I see it is this. You have
16 now had fully put before you the Atlanta Report and
17 you have heard from the authors of the Atlanta
18 Report. The authors have concluded in the report
19 and with extended cross-examination on this issue
20 that two of all the Hospital personnel examined by
21 them, two nurses had a significant association
22 between their hours of duty and the onset of
23 terminal events for, in the case of Phyllis Trayner,
24 28 deaths and Susan Nelles for 21. The strongest
25 association based on their study therefore was with
the two nurses -- and in my submission --



1
2 THE COMMISSIONER: I thought the
3 other two were almost the same as Nelles?

4 MS. CRONK: I'm sorry, I am not
5 suggesting there were not others close to Susan
6 Nelles, but for Phyllis Trayner that certainly is
7 not the case, there were 28.

8 I put it to you this way, sir, if
9 Miss Costello independently concluded based on her
10 experience and observations that certain of these
11 children were killed and that the same two people
12 were in some way linked to those deaths to the
13 exclusion of others, that evidence should be before
14 you because it relates directly to the cause of
15 death issue.

16 THE COMMISSIONER: It relates to
17 it. The problem though is if it is pure speculation
18 I would like to keep it out.

19 MS. CRONK: I understand.

20 THE COMMISSIONER: If it is pure
21 speculation, if there is some basis for it, if there
22 is some basis for it you could -- I see no reason
23 why you shouldn't see Miss Costello right now, but
24 this is -- if this is the rule that nothing that
25 someone said to her, other than what was said by a
member of the Trayner team, should be received, nothing



1
2 that Radojewski said or anybody else, or the police
3 said, or anything like that should come from her.
4 But her own statements of course she can ordinarily
5 be cross-examined on. The great danger is if her
6 own statements are pure speculation just as anybody
7 around here can say, well, I think so and so was
8 the villain or the villainess in this whole case.
9 That really is not an awful lot of help to us.

10 MS. CRONK: I understand that, sir.

11 THE COMMISSIONER: Because I am
12 supposed to make my own conclusion based on the
13 evidence not on the basis of something else. I
14 think you could see Costello and find out what --
15 just exactly what prompted these statements, and if
16 there is nothing behind them except intuition or
17 something of that nature, then I really don't think
18 we should have it. Can you not --

19 MS. CRONK: Mr. Commissioner, I
20 would not support for a moment the suggestion that
21 merely speculative evidence be placed before you.

22 THE COMMISSIONER: No.

23 MS. CRONK: My submission to you is
24 this, what I understand the basis upon which she
25 made these remarks -- may I just conclude, sir?



1

0jan84

2

THE COMMISSIONER: Yes, all right.

Nrc

3

MS. CRONK: In my submission, Miss

4

Costello, in her position, should be allowed to

5

express an opinion on obviously the cause of death

6

issue if this relates to it, so long as she possesses

7

personal knowledge of the facts upon which that

8

opinion is based. It seems to me, sir, that her

9

evidence, if indeed it is in accordance with what

10

is in these notebooks, will be of assistance to you

11

in two different ways.

12

The first way is that it may render

13

more probable or less probable the theory that all

14

of these children died from natural causes. Her

15

evidence may assist you in that regard, if she, as

16

an experienced Head Nurse on Ward 4B, independently

17

concluded that some of these children had been

18

killed.

19

THE COMMISSIONER: That is a per-

20

fectly legitimate question, it would seem to me, to

21

ask: Have you any opinion upon how these children

22

met their deaths and what the basis is, and perhaps

23

to the extent that she is an expert, it might be of

24

some assistance. It might conceivably be of some

25

assistance, but when she starts to identify someone

as the perpetrator, if that is based only upon her



C2

1

2

impression of the person, is that the sort of thing
that would be allowed?

3

4

5

6

7

8

9

MS. CRONK: I understood, and I put
it no higher than this, sir, I put it no higher
than this, I had understood that the reason she made
reference to those two women in her interview with
the police was because in her mind the only way that
those deaths could improperly have been effected was
by the involvement of two Registered Nurses.

10

11

THE COMMISSIONER: Why? Why does
she say it is only those two?

12

13

MR. SOPINKA: That is an opinion in
itself.

14

15

16

17

THE COMMISSIONER: How did those
two -- for instance, why not ~~Sam~~ Scott? Why was she not --
sorry about this, to bring your poor client in for
the first time, but why not? Is she not every bit
as capable of --

18

19

20

MS. CRONK: Well, sir, that is indeed
the area that I wish to explore with her. I suggest
to you, sir --

21

22

23

24

25

THE COMMISSIONER: Well, I know, but
what will her answer be?

MS. CRONK: All right, Miss Costello's
answer to that, when the question was put directly to



C3

1

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

her, if you want the details of it, sir, is that at the meeting on March 23rd at Elizabeth Radojewski's house, she did not think Sui Scott was present. There is other documentary evidence that suggests that the woman was there.

THE COMMISSIONER: Would she have been unable to look at her too, if that is the case?

MS. CRONK: I have no idea, sir.

THE COMMISSIONER: Well, I really want to be awfully careful about how this evidence comes out, because the papers are just wild to get something like this, and it really does not advance it too much, at least I do not think it advances it.

But if you have got anything solid, if she said I thought that -- let us say, for example, I thought that Trayner and Nelles were acting in a very suspicious way when these children were -- well, in what way were they acting in a very suspicious way? Well, they were conferring off in a corner, they were doing all this sort of thing, together, if that sort of thing comes up, that is evidence. But if it is merely a speculative conclusion, I would like to keep it out.

MS. CRONK: I understand that, sir, and I cannot put it to you more strongly than I have.



C4

1

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

The situation, as I understand it, is simply this, that she concluded, and you will hear from her the reasons that she did, that there was a killer attached to some of these babies. She said that not once but twice in the notes.

THE COMMISSIONER: And she concluded that from what?

MS. CRONK: Well, Ms. Symes may be, with respect to the first comment, entirely right. It may well have been as a result of a meeting that she had with Sgt. Warr when he identified himself as a Homicide officer. She also suggested, however, that at that meeting when there were numerous nurses present in the room that she had difficulty with those two women in particular.

The only basis that she has been able to suggest to me for that difficulty was that she felt that it had to be a Registered Nurse who was involved and of the Registered Nurses who could be involved, it had to be those two. I can put it no higher than that.

It seems to me, sir, that if this woman, based on her exposure to those wards and these teams, felt that that was likely to be the case, that may be of some assistance to you in



C5

1

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

determining whether it is probable or improbable that all of these children died from natural causes. If you are of the view, sir, that it will not be of assistance to you --

THE COMMISSIONER: Well no, it might be of assistance; I do not know. If she reached an opinion that someone had poisoned the children and if she reached the opinion that probably it has to be a nurse, it may be acceptable on the basis of her own experience and expertise, I do not know.

Do you have any objection to that kind of question: Did you, at that time, have an opinion which you had reached yourself as to the cause of death of the children?

MR. SOPINKA: In my submission, she should not be -- this is not a matter of opinion evidence. I mean, if she has a factual basis, for instance, her conclusion that it must have been a Registered Nurse, what is the factual basis, that is proper, you can draw that conclusion. It may be that she can go as far as to say that she thought it must be a -- but if the only basis is that she thought it was a Registered Nurse and then she says, well, it must have been those -- that is valueless.

In my submission, no Crown Attorney



C6

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

would ever tender opinion evidence of a layman on a question of fact. If she has evidence on which that can be based, that can be adduced and you can draw that conclusion, but it is so prejudicial to have her give the opinion that it can be drawn as easily. In my submission, if there is a dispute as to the basis for this, it should not just be led because there is a dispute and you accept what Commission Counsel says. Let us hear what her basis is. It is not unheard of and it is very common in the most hard-hitting Commissions to have evidence heard in camera in order to satisfy the Commissioner that there is a basis for the evidence going in. If you feel inclined at all to have this opinion adduced because you think there may be some basis for it and you are not content to just have the basis put in, let us have her examined in camera.



1

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

THE COMMISSIONER: It seems to me it can be done fairly readily. Did you reach a conclusion yourself based upon your own observations as to how these children met their deaths? Before you answer what the conclusion was, what was the basis for it, on what grounds did you reach that conclusion? Then if the grounds are from what the police told me, the answer to that is we are not interested in having it at all. If the grounds are, well, I was merely speculating, we are not going to have that either.

But if she can give some reason for her conclusion that she has reached before we get the conclusion, then let us have it and let us consider it at that time, and I will simply say, well, it is not strong enough for me, I am not satisfied with that and I do not want to hear it.

Can you do it that way?

MS. CRONK: That presents no difficulty at all, Mr. Commissioner.

THE COMMISSIONER: Well if you can do that, and if I can ask everybody else to do the same thing when they are cross-examining.

Yes?

MS. JACKMAN: Mr. Commissioner, if



1
2 she then says no, I did not reach any conclusions
3 myself, does that allow Ms. Cronk to put the state-
4 ment in to contradict her?

5 THE COMMISSIONER: No, no. You mean,
6 she did not reach any conclusion herself.

7 MS. JACKMAN: Well, I mean, she
8 may have been relying on Sgt. Warr's statement, as
9 Ms. Symes has already pointed out to you, in which
10 case she did not reach any conclusion herself. If
11 she answers no, I did not make any conclusions myself,
12 then it seems to me it would open up the question
13 of having the statement admitted to contradict what
14 she said.

15 THE COMMISSIONER: It might, but it
16 probably would not because probably you would say
17 did you make -- you can certainly do that without
18 the statement, did you make a statement? If she
19 is a liar, there is nothing we can do. I mean,
20 she obviously is going to get into trouble if she
21 is going to start lying, but assuming that she tells
22 the truth, then you start off by saying, did you
23 reach a conclusion, did you make a statement there
24 as to your views with respect to the deaths of these
25 children, and if she says no, then there is nothing
that Ms. Cronk can do but put the statement to her



1

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

and say you are supposed to have said this. But assuming she tells the truth, yes, I did, before you tell us what it was you said, how did you reach this conclusion, and if she says it is because of what the police told me earlier, was there any other reason, no, that is the end of it; we do not have to go into it any further.

I think as long as it is handled delicately and people thinking about it before they go on, then we will not have this sort of speculation come out. Do you follow me? But if she is going to say, no, I never said anything about that meeting about what I thought about the cause of death of these children, we cannot help it. It has got to be put to her because she clearly is not telling the truth or the police are not telling the truth or something, but she does concede, I take it, does she not, that she did make the statement?

MS. CRONK: She will not deny, sir, as I understand it, what is in the notebook.

MR. SOPINKA: The only problem is that she may not dignify that as a conclusion. I do not think at that stage, if she says no, I did not draw any conclusions, she should then be cross-examined by prodding into statements --



1
2 THE COMMISSIONER: No, but did you
3 not say something to them about this sort of thing,
4 without putting the precise thing that she said.
5 I really am very anxious, and these, I think, are
6 the rules.

7 Yes, Mr. Hunt?

8 MR. HUNT: There is an aspect of
9 this that I do not think we have canvassed here that
10 I think is important, and that is that we have said
11 that beginning with this witness questions relating
12 to the police investigation can be dealt with. Now,
13 as far as I am aware, this is the first time that
14 any person has suggested that as early as March 23rd
15 they had in their own mind, for whatever reason,
16 Phyllis Trayner as a suspect, and it is apparent
17 that that was not conveyed to the police by Nurse
18 Costello until June of 1982.

19 Now, the concerns that you have
20 raised about the basis for her feeling that there
21 was some suspicion about these two people are
22 entirely appropriate when it comes to the factual
23 conclusions she has reached on the question of cause
24 of death. But that is not the real issue when it
25 comes to the question of the police investigation,
and I do not want to take Mr. Percival's argument



1
2 away from him here, but it really is relevant that
3 a nurse, a Head Nurse on that ward, was suspicious
4 of Phyllis Trayner as early as March 23rd and
5 possibly, as well, of Nelles, but I suppose there
6 is more basis for someone being suspicious of her
7 on that day, but suspicious of Phyllis Trayner on
8 March 23rd and did not convey that to the police
9 at that date when she was interviewed.

10 Now, that may have very serious
11 repercussions for the police if that had been
12 conveyed to them on the 23rd of March. It could have
13 turned their investigation in a whole different
14 direction, and that is why, if that is to come out,
15 and in my submission that has to come out, that is
16 certainly something I think the police would be
17 interested and it may well be on behalf of the Crown
18 as well, But if that is part of the police
19 investigation that is being enquired into, then I
20 do not think you can keep that out merely because
21 on another claim it has some prejudicial effect.
22 It has got to be something that we explore, and it
23 is not appropriate to leave it to the second phase
24 when what we are dealing with here is in terms of
25 these witnesses the police investigation. So in my
submission, the other question aside, there is a



1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

very relevant reason why her feelings, whatever they are, it could be she had a dream in the nighttime --

THE COMMISSIONER: Well, supposing it does not come out, supposing no evidence comes out that she had any feelings one way or the other as to who the perpetrator was, because the grounds upon which she reached this conclusion were pure speculation, then is it any particular concern of yours as to whether or not she told the police?

MR. HUNT: Concern of?

THE COMMISSIONER: Well, of yours or of the police; is it?

MR. HUNT: Well, I think it has to be a concern of the police.

THE COMMISSIONER: No, but merely because they thought somebody must have done it without any evidence, whatever, why would you want to know that?

MR. HUNT: Well, at that point the police really only had one group of people to rely on, and that is the people at The Hospital for Sick Children, and they had to look to them for every scrap of assistance that they could in channelling them into who was responsible for this. Now, this



1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

is March 23rd, the day after Justin Cook dies, and if somebody there is suspicious of someone, in addition to Susan Nelles, and does not tell it to the police, then that fact, I would submit on behalf of the police, is very relevant.

THE COMMISSIONER: But if the suspicion is based upon nothing?

MR. HUNT: It may be nothing. Police go out and investigate people based on what we might think is the most improbable pieces of information and quite often they turn out to be very fruitful investigations. So from their point of view, I do not think it matters what the basis for it is. The police themselves act on a gut reaction to feelings based on their experience, and they appreciate gut reactions of others that are also based on their experience.

So what we may consider to be something rather frivolous and not worthy of consideration, from the point of view of a professional investigator it is clearly something that they turn their attention to.

MR. PERCIVAL: Mr. Commissioner, carrying that one step further, certainly it was not until many months later that a meeting in Radojewski's



1
2 house on March 23rd came to the knowledge of the
3 police. So I think it is fairly clear that under
4 the circumstances what she felt or did not feel as
5 a result of that meeting was never communicated to
6 the police, and that will become abundantly clear
7 in the second phase.

8 But I suppose we can skate around
9 it. I thought you, sir, had come to a conclusion,
10 and I think what may be relevant is that, for
11 instance, carrying it one step further without
12 pointing the finger, did you have any opinion, et
13 cetera, and what was it based on, did you ever
14 communicate that to anyone and when was the first
15 time you communicated, and of course, it is going
16 to be presumably on June 17, 1982, again without
17 mentioning what she felt. But that could all be
18 brought out, it seems to me, in order to sort of
19 comply with your present ruling or as I perceive
20 your present ruling to be.

21 MR. SOPINKA: This is going to be
22 like treading on eggs because, I mean, she is
23 liable to blurt this evidence out.

24 MR. PERCIVAL: I am sure Ms. Symes
25 is continuing to talk to her, and I am sure whether
she is under cross-examination or examination -- you



1
2 know, this is all going to be conveyed to her at
3 some point before she is asked the magic question,
4 Mr. Commissioner. Do not disabuse yourself of that.

5 MR. LABOW: Mr. Commissioner, you
6 may be drawing a very fine line here because this
7 kind of conclusion may be based partly upon her
8 experience and what she observed and partly upon the
9 fact that a Homicide officer questioned her. That
10 may be true with any of these statements, or the
11 fact that they noticed police officers in the Hospital.

12 All of these observations may
13 accumulate into some kind of conclusion, and where
14 are you going to draw the line?

15 THE COMMISSIONER: Well, it is not
16 going to be easy.

17 MR. SOPINKA: We will cross that
18 bridge when we come to it.

19 THE COMMISSIONER: Well, we are
20 going to have to, and we are going to have an awful
21 lot of problems. There is not a solution that is
22 easily done as there is in a criminal trial where
23 you just exclude the jury and the press know that
24 they go to jail if they report. I do not think I
25 have even got any power to tell the press that they
cannot publish anything. I do not think I have got



1

2

3

4

anything like this at all. I can ask them, but if one does and the other four or five do not, then that hardly seems fair at all.

5

6

7

MR. SHINEHOFT: Mr. Commissioner, do you not have the power, as Mr. Sopinka has suggested, to have part of this leading evidence heard in camera?

8

9

10

11

12

13

14

THE COMMISSIONER: Yes, I have, but this is the problem. We are going to be going in and out of this thing and getting everybody excluded from the room, and the press and everybody else, and it is going to be a terrible way to try to run -- and how would we know that somebody sitting in the back of the room -- this sort of thing can easily get out.

15

16

17

18

19

20

21

22

23

24

25

What I would like to have is co-operation from all counsel, knowing what the problem is, the first thing before you ask the question is to ask the basis for the conclusion, the basis for what it is. Now, it may be, Mr. Hunt, that the thing and the way it develops, there will be no way that you can avoid doing it, but I would think at least you could say, did you have a suspicion of anyone else besides Susan Nelles or perhaps you do not even want to say that, but did you have suspicion,



1
2 did you communicate any of your suspicions to the
3 police, how many nurses did you suspect, without
4 mentioning names at all. There may be some way
5 that that can be done.

6 If it cannot be done satisfactorily
7 and you owe your duty to your client, you may well
8 have to say, well, at this point I want to discuss
9 in camera with you some problems. We will just
10 have to retreat and go through this again.

11 MR. SOPINKA: With respect to Mr.
12 Hunt's point, why not do it this way? I mean if
13 the police testify that they were not told this
14 and if none of us challenge it -- if we challenge
15 it, then we have got to have her back and we have
16 got to ask that the question be put. If we do not
17 challenge it, then you are going to accept the
18 police evidence that they were not told by Miss
19 Costello about any suspicion about Trayner.

20 MR. HUNT: But the police do not
21 get Miss Costello saying that that is who the person
22 she was suspicious about was. You see, the police
23 are caught in the position where in the public's eye
24 there is some question raised as to whether or not
25 they carried out a proper investigation. The
public is now hearing about all this evidence that



1
2 Trayner was there for these deaths and there is no
3 indication, at least to the public, that somebody
4 there was suspicious of Trayner, that particular
5 person, and did not turn them on to it.

6 So, on the one hand, it nicely
7 protects Nelles and Trayner from any prejudicial
8 effects, and I am not suggesting that that is not
9 an appropriate thing to do, but it leaves the police
10 as the ones hanging out there without the full
11 story being told.

12
13 —
14
15
16
17
18
19
20
21
22
23
24
25



1

2

/BM/ak

3

THE COMMISSIONER: Well, that does worry me.

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

MR. SOPINKA: Well, I don't agree with that. I mean, subject to hearing her foundation for this statement, I'm sure the same thing would have occurred to any reasonable person that if two people were there all the time maybe they are suspects but I don't think it comes as a great revelation to the police that somebody thought it might have been one of those two.

THE COMMISSIONER: Well, I am concerned about that problem because while we try to protect two people we are doing some others some harm. I don't know how, but I think we will just have to face it when we come to it. We will see what has happened because for all we know Ms. Costello may well have some very good reasons for suspecting both of those people and that will come out and then obviously at that point what she said becomes completely very satisfactory, very vital evidence.

MR. SOPINKA: Can we just agree that before we reach that second stage, once we have the foundation for any conclusions we have an opportunity to make submissions.



1
2
3 THE COMMISSIONER: Once we have
4 the foundations then, yes, I will make a ruling as
5 to whether or not it will go on any further.
6 Probably in some unclear obvious cases I won't even
7 ask for argument but if it is a clear case, on the
8 basis of what the police told me was there anything
9 else, no, just entirely what the police said, well
10 then, I don't want to hear about it because obviously
11 if it is based on what the police told me it couldn't
12 even do the police any harm.

13 So, is there anything else then we
14 want to discuss?

15 MR. PERCIVAL: I was hoping we
16 were going to have coffee.

17 THE COMMISSIONER: Yes, I think we
18 will have coffee, unless somebody else has anything
19 else they want to raise in the absence of the press.

20 MR. TOBIAS: My only concern,
21 Mr. Commissioner, is the apparent lack of the general
22 principle. I mean, first of all,

23 what I'm about to say now may be rendered
24 entirely irrelevant by what the Divisional Court
25 does but once we get the police report, if indeed
we do get it if there is that wide distribution,
then do I understand that we have these kinds of



1
2 discussions with respect to every witness and every
3 statement that was made?

4 THE COMMISSIONER: No, I don't think
5 so. These are the rules. First of all, no hearsay
6 unless the hearsay would be admissible under other
7 silence; secondly, I don't want any suspicion or
8 hunches that aren't based upon anything and I think
9 the way, the manner to do it is to find out the
10 basis for the opinion and if the basis for the
11 opinion is clearly valueless then we just don't
12 want to have it. If the basis is that it is upon
13 something I saw, what did you see, I saw so and so
14 with a smoking gun, well then, that's a pretty good
15 reason for suspecting that something is improper.
16 But it may be that it will get so delicate that we
17 will have to retire somewhere. It is going to be
18 difficult, it is going to be difficult. This is my
19 point. Remember, I don't want this thing to turn
20 into a witch hunt against Trayner, Nelles or any
21 of the others; at the same time I don't want it to
22 be a witch hunt against the police by keeping out
23 all of the evidence that might be of value to the
24 police, so, we are going to have some trouble.

25 At any rate, you have now seen,
there is another statement that you've got your



1
2
3 hands on, so, you know what most of them are like.
4 Who knows, they may all end up in your hands.

5 MS. CRONK: Excuse me, sir, just
6 before we break on this issue, lest it be misunder-
7 stood, I am most aware that this is a delicate
8 matter and we will abide by the guidelines that
9 have been given but I do under the circumstances
10 think and would request that it be appropriate to
11 direct that no counsel discuss this matter with
12 Ms. Costello prior to this part of her evidence this
13 afternoon.

14 THE COMMISSIONER: I was sort of
15 hoping that you would sort of discuss it with
16 Ms. Costello to find out what the basis is and if
17 you find by discussing it with her that there really
18 is none then the issue will not arise, but I'm
19 going to ask the question. Isn't that it?

20 MS. CRONK: Well, sir, I understand
21 and recognize the value in that and recognize as
22 well that I have had two discussions with
23 Ms. Costello on this already. It will obviously
24 be of benefit when we come to this particular area
25 that she listen to the question most carefully and
answer only the question posed. But with respect to
the matters discussed here this morning and the



1
2
3 possible theories advanced as a basis for her opinion,
4 that should not in my opinion be discussed with her
5 before she is asked to give this evidence this
6 afternoon.

7 THE COMMISSIONER: Yes, all right.

8 MS. SYMES: Mr. Commissioner, I
9 take great exception to that. This is my client
10 and I would like to speak to her and I am entitled
11 as an officer of the Court to use my discretion.

12 THE COMMISSIONER: All right, all
13 right. It is only that this is a Commission that
14 you are allowed to speak to your client at all, at
15 this point you would not under any circumstances.
16 So, if you are taking great resentment, please don't,
17 that's all, because nobody is saying anything.

18 What has been happening here is
19 of course totally uncontrollable to try and police
20 this like a trial; but in any event it isn't a
21 trial. The only thing is that it is pretty obvious
22 to me that when somebody is backing down from a
23 statement that something has happened and I probably
24 give it as - I give the evidence generally a great
25 deal less weight.

What is your concern about Ms. Symes
speaking to her client?



1
2
3 MS. CRONK: Please understand, sir,
4 that it wasn't directed to Ms. Symes only. Our
5 practice has been to introduce a relaxation of the
6 normal rules and any counsel can talk to any witness
at any stage during cross-examination.

7 MR. SOPINKA: Well, I submit that
8 Ms. Symes should be present as well. If Ms. Cronk
9 doesn't want Ms. Symes there then I am a little
10 concerned because I think they should both be there.

11 MS. CRONK: Well, I wasn't proposing
12 to talk with her about it either.

13 THE COMMISSIONER: I'm not going to
14 make a ruling, it's too late now at this point about
15 counsel speaking to witnesses. I just ask you all
16 to realize what we are trying to do. We are trying
17 to find out if there is a legitimate basis for what
18 she is saying and if there is one I naturally do not
19 expect you to discourage her from saying that, I
20 expect you to say, well, that is exactly the sort
21 of thing the Commission wants to know, if you have
22 that legitimate basis and if there isn't a legitimate
23 basis then we don't want to hear it.

24 Yes, Mr. Hunt.

25 MR. HUNT: Well, I want to support
Ms. Cronk's application. The reason is this, and



1
2
3 I'm not directing Ms. Symes, but we had an incident
4 before Christmas with Nurse Brown and we had to
5 go through her statement with her in some detail
6 and I reread it this morning and there is no question
7 that she was trying to back down from things that
8 she told the police and it wasn't until she was
9 pressed and pressed hard that she admitted that she
10 said it to the police and she admitted it. But
11 that is not my point. My point is this, and I am
12 not suggesting that this is Ms. Symes but it may
13 be that the nurses have amongst themselves decided
14 that things they said to the police they don't
15 want to live with and they may be taking things
16 from what counsel says that aren't intended by
17 counsel ---

16 THE COMMISSIONER: That may well be
17 and in some occasions there seems to be a touch of
18 that. But as I have said before, if the witness
19 is going to lie, if the witness is going to withdraw
20 from some of the statements that have been made to
21 the police we can't do a thing for her and we can't
22 help her but cross-examine her on did you say this, did you
23 not say this and if she says, well, I said that but
24 I lied, and I am telling the truth now then we will
25 just have to deal with it.



1

2

3

MR. PERCIVAL: Mr. Commissioner,
Mr. Sopinka and I ---

4

5

6

7

8

9

10

11

12

13

MR. SOPINKA: We are in agreement
on this, and this has got to be a milestone. The
only reason for this communication is to ensure
that she doesn't blurt out - I mean, everybody has
been asking her about this statement and, so, as
soon as you touch it it is going to be like pricking
a balloon and the only purpose is to caution her
that this is the way we are proceeding and I don't
see any objection and everybody will be satisfied
if both Ms. Cronk and Ms. Symes talk to her. Only
for that purpose.

14

15

THE COMMISSIONER: What about a
joint interview?

16

17

MS. CRONK: I have no difficulty
with that.

18

19

MR. PERCIVAL: I am certainly
content with that.

20

21

THE COMMISSIONER: All right, why
don't Ms. Cronk and Ms. Symes see Ms. Costello.
We will take until 10 minutes to 12:00.

22

23

24

25

MS. CRONK: Sir, may I. There is
no reason that it has to be done now. I won't reach
this matter until very late this afternoon and we



- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25

can talk to her over the noon break. So, if you
are bearing that in mind about taking your coffee
break.

THE COMMISSIONER: All right. All
right now, let's go down and at a quarter to 12:00
we will start into the hearing.

MS. CRONK: Thank you, sir.
---Whereupon the In-Camera hearing adjourns.

